LAW MAKING BY UNOFFICIAL MINORITIES

Two recent books by Julius Henry Cohen,[1] differing from each other widely both in subject matter and in style, have this much in common: they both advocate the creation of judicial machinery by voluntary contract, and they both suggest the question whether the rules established by these unofficial bodies constitute law. *Commercial Arbitration and the Law* advocates removal of the existing American legal obstacles to arbitration contracts, obstacles maintained in large part from a jealousy of the ousting of the jurisdiction of the regular courts. *An American Labor Policy* urges the creation of "a new democratic law and order" to be brought about chiefly by voluntary contracts between organized business and organized labor in each industry, providing for the control of the labor conditions in the industry by a joint board. In both books Mr. Cohen shows a disposition to favor the extension of rules of law to many details now left to individual and changing caprice, the precise rules to be formulated by unofficial bodies possessing greater familiarity with the subject matter than the courts or the legislature can possess. Is what he advocates a "usurpation" of governmental powers by unauthorized groups? Is it, in effect, what Mr. Cohen himself so heartily and so conventionally detests—"Bolshevism"?

Commercial Arbitration and the Law is a brief for the judicial reversal of the doctrine of the revocability of commercial arbitration agreements. After an elaborate examination of the authorities, early and late, the author comes to the merits of the question. He argues that when parties agree to refer a matter to arbitrators there is no public policy for refusing to give effect to such agreements. They would have the effect of saving the courts from much needless litigation. As for ousting the courts of jurisdiction, he argues forcibly that parties are always permitted to do this when they make releases. He contends that in reality it is not the agreement of arbitration, but the refusal of the court to grant specific performance of that agreement, which ousts the court from jurisdiction.[2] Perhaps a better way of putting it is to say that whenever any party by contract abandons some right he previously

[1]Cohen, Commercial Arbitration and the Law (1918) pp. XX, 339. Cohen, An American Labor Policy (1919) p. 110.

[2]Commercial Arbitration and the Law, pp 274.

had, he is necessarily taking from the courts the jurisdiction over the enforcement of that abandoned right; and is at the same time conferring on them jurisdiction to enforce the new legal claim which the other party to the contract now has against him. On the other hand, the arbitrators or the contracting parties depend completely on the ordinary courts for the effectiveness of their awards or contracts. It is true, the action of the arbitrators affects the legal rights and duties of the parties; so does the action of any two contracting parties themselves; but the legal rights and duties resulting from the action are legal rights and duties only by virtue of their enforceability in the ordinary courts. Courts are not ousted from jurisdiction merely because they accord to private parties the initiative in the creation of some of the rights and duties which they, the courts, enforce; if they were, they would be ousted every time a contract is made, or the title to property is transferred.

In all such cases, particular legal rights and duties are created at the initiative of private individuals. But they are created (or modified or extinguished) by virtue of the power of mutual coercion (in the form of pre-existing rights) vested by the ordinary law in the two contracting parties. It will not do to say that the party to a contract is a voluntary agent merely. He makes the contract in order to acquire certain legal rights he does not now possess, or to escape certain legal obligations with which he is now burdened. Were his liberty not restricted by these obligations imposed on him by the law and enforced in the ordinary courts, he might never submit himself to the new obligations of the contract. Thus in a sense each party to the contract, by the threat to call on the government to enforce his power over the liberty of the other, *imposes* the terms of the contract on the other. When the rights and privileges which one party possesses are vastly superior in strategic importance to those possessed by the other (when the restraints on his liberty, in other words, are vastly less burdensome than those on the liberty of the other), the other party may in effect be compelled to submit by contract to almost any terms imposed by the stronger party. That is, the weaker party, whose previous legal restrictions are intolerable, may incur new restrictions as the price of escape from the old. For instance, if a single employing company owns all the land in a town and all the local food supplies, any property—less inhabitant, without even the price of a railroad ticket, is at the outset under a legal duty (enforceable in the courts)

to refrain from eating or from lodging under a roof. This duty he is manifestly compelled by necessity to escape; but he cannot escape without obtaining the consent of the company. That consent may perhaps be obtainable only by contracting to submit to rules made by the company, any subsequent violation of which will be an unlawful breach of contract, of which the courts will take cognizance. Under such extreme circumstances it is literally true that the company can make rules which the inhabitants will be forced by the governmental authorities to obey—rules which, in their legal effects, are indistinguishable from governmental acts. Under extreme circumstances of an opposite sort, a labor union might be able, quite lawfully, to perform what in effect are governmental acts. It is not a case of plural sovereignty, for the stronger party is not using *his own* force, but is relying on the courts and other state agencies, first to exert pressure on the weaker to submit "voluntarily" to his terms, and then to enforce those terms after submission. The submission is about as voluntary as Sir Ruthven Murgatroyd's compliance in "Ruddigore" with the request of his ghostly ancestors, "So pardon us, so pardon us, so pardon us—or die." The stronger party, tho not responsible like a governmental body, is just as powerful.

Such private "usurpation" (if the term can be used in this connection) of governmental functions is more frequent than is conventionally recognized. Ownership of property, and even personal freedom not to work except on one's own terms, always involve some detriment to other people's interests. To escape this detriment, these other people can frequently be compelled to submit to other contractual restraints on their freedom. These new restraints may consist of obedience to rules, not yet formulated, by bodies still to be constituted. The party may be forced, that is, in order to escape a more serious detriment to his interests, to submit to an arbitration agreement. Some imperfect apprehension of the fact that there is an element of coercion in these agreements may account for the feeling of some of the judges that it is bad policy to force a man to give up a "right" to resort to the courts for a determination of the merits of his controversy. In the same manner an imperfect apprehension of the fact that there is an element of force in contracts accounts for much of the current talk about "coercion" by labor unions, with the corollary that rules governing wages and working conditions must be fixed by some public authority rather than by an agreement "dictated" to a helpless employer,

by the "working-class tyranny" of a union. Between parties of somewhat equal strength, however, as in the ordinary commercial contracts between two business men, this element of coercion is sufficiently mutual, in all probability, to prevent one side acquiring by an arbitration contract any undue advantage over the other. There is therefore apparently no valid objection to letting the parties "coerce" each other into submission to the "rule" of the arbitrators. The latter have been chosen, in a sense, democratically, by the parties affected. And if a permanent board of arbitrators, such as the London Court of Arbitration referred to in the book, should "make law" by establishing a series of precedents, it would then be time enough to consider whether the sovereign state should step in, when occasion demands, and modify these precedents, as it does those of the ordinary law courts.

In the case of labor contracts, however, as Mr. Cohen points out, the situation is frequently such that one side or the other (as the balance of power changes) may get the upper hand in practically dictating terms to the other. Mr. Cohen's *American Labor Policy* appears to be a plea for the voluntary creation by contracts between the organized employers and the organized laborers in each industry, of a representative board to govern the industry. Each side would voluntarily abandon, by contract, the right to sever the employment relation at will, and would delegate to the board the power to make rules and to enforce them, with the aid of the governmental authorities. Like arbitrators in commercial disputes, these boards would dictate the legal rights and duties of the parties, to which the courts would give legal effect; and these rights and duties would be determined according to principles laid down by the board, rather than by the momentary predominance in power of one side or the other. The contracts themselves would be subject to the approval of the community, acting through a board similar to the War Labor Board. Whether the detailed rules laid down by the boards of each industry would be subject to governmental approval is not so clear, but they might well be without doing violence to the author's scheme. His plan is perhaps best summarized in his own closing words:

"Freedom to organize, freedom to deal collectively, security from arbitrary discharge, security against strikes, resulting from the free interchange of opinions, but, when made, the compact subject to the approval *of* the community and, after approval, enforceable *by* the community—these would seem to constitute the basic

elements of a new *democratic law and order*. To accomplish it we shall need to revise our legal conceptions of freedom of contract."[3]

The author puts this scheme forward as a substitute for industrial anarchy based on the philosophy of power. The plan, if successful, would indeed seem to eliminate the constant resort to strikes and lockouts, with their accompanying atmosphere of strife, and would doubtless improve the morale of industry, as the author maintains, by making the worker more interested in his work. Mr. Cohen's practical experience with labor plans of the sort, in the garment industry and elsewhere, makes his judgment on these matters peculiarly valuable. But would the wages not still be determined by the relative power of the two groups? True, within each industry, the power would be exercised by the governing board; but by what criterion would that board determine wages? Except when a minimum living wage is in question, would the criterion be anything other than what the bargaining power of the two sides would be likely to arrive at if left to work itself out, over periods of time long enough to avoid fluctuations? Would not the wages thought to be "reasonable" in a given case be about what the board thought the labor was "worth"; and what is it "worth", except what it could compel an employer to pay? If the board went on any other principle, it would really find itself responsible for devising wholly novel legal principles for the distribution of wealth. This is pointed out most clearly by Professor Taussig.[4] And new principles for distributing wealth cannot be established satisfactorily by wage boards acting independently of those who fix prices and taxes.

Most of our present distribution of wealth is the result of the relative power, latent or active, of various individuals and groups. The power itself is derived in part from the law's more or less blind and haphazard distribution of favors and burdens, in the shape of powers over others and obligations to others. If our system of *Machtoekonomie* is to be altered, something more than wage-boards will be necessary. A man's income depends not alone on his relations with his employer (or employees), but on his relations with outside buyers and sellers as well, and his indirect relations with other members of the community (through the government), as taxpayer, or beneficiary of public expenditures, or consumer of government-owned products or services. Wage-boards

[3] An American Labor Policy, pp. 109-110.

[4] 2 Principles of Economics, Ch. 57 §§ 6, 7.

obviously deal with only one of these relations. Price-fixing, tax-levying and revenue-spending bodies are equally essential to the elimination of mutual coercion as a factor in economics. Not that it is necessarily desirable to eliminate this mutual coercion altogether; but the cases where the law-given powers of some groups over others are liable to abuse are not alone cases where the power is exercised by employers or by employees against each other. The substitution of law for anarchy, or more accurately, of responsible for irresponsible government, is quite as necessary in the adjustment of the worker's relations with those to whom he pays his dollar as in the adjustment of his relations with those from whom he earns it.

Mr. Cohen's proposition, nevertheless, is a step in the right direction. It does, it is true, give to unofficial boards the power to make rules governing the legal relations of individuals. This may be "usurpation" of governmental power, but it is no more so than when the owner of a theatre establishes a "no-smoke" rule, or an unregulated steel industry decrees the price of steel rails. In all these cases, rules are made with the help of governmental power over others, conferred in the form of legal rights; in all of them a question arises whether the power ought not to be subjected to some limitation. Mr. Cohen's labor policy is an attempt to transfer the governmental power already "usurped" by unofficial bodies of employers or employees, to another unofficial body more representative of the two, and to have this body, in turn, subject to some control by the official government, representative (in theory at least) of all the public. If those who scent "Bolshevism" or "minority dictation" in every attempt of a labor union to impose terms, would pursue their scent to its logical conclusion, they would find our whole scheme for distributing income one vast structure of "minority dictation". They would also find that the remedy is no such simple matter as getting out an injunction against the "usurpers". It consists, if indeed there is any remedy, in the construction of new organs of law-making and in the creation of new law for these new organs to apply when they deal, as deal they must, with questions concerning the proper distribution of income. It is in facilitating the creation of the new organs of government that Mr. Cohen's chief service lies.

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